2015 IL App (5th) 140443-U

NO. 5-14-0443

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JANICE LaRIVIERE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 13-L-609
	)	
BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY, Governing SOUTHERN ILLINOIS UNIVERSITY EDWARDSVILLE, and KENNETH NEHER, Individually,	)	Honorable
	)	Robert P. LeChien,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err by dismissing the plaintiff's complaint for employment discrimination pursuant to the Illinois Civil Rights Act (740 ILCS 23/5 (West 2012)) and for retaliation pursuant to the Illinois Whistleblower Act (740 ILCS 174/1 (West 2012)) because the doctrine of *res judicata* precludes all claims based on allegations supporting claims she filed in a previous action in federal court, and the plaintiff cannot state a cause of action based on factual allegations occurring subsequent to the dismissal of the prior action.

¶ 2 The plaintiff, Janice LaRiviere, appeals the order entered by the circuit court of St. Clair County on August 14, 2014, granting the motion to dismiss filed by the defendants,

Board of Trustees of Southern Illinois University, governing Southern Illinois University Edwardsville (SIUE), and Kenneth Neher, individually. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 On December 16, 2013, the plaintiff filed a complaint in the circuit court of St. Clair County. The complaint alleges that the plaintiff is an African-American woman who is an employee of SIUE. She began her employment with SIUE as an assistant director for Alton operations within the department of facilities management. In 2005, she transitioned to assistant director for building and maintenance and held that position as of the time the complaint was filed. In that position, her supervisor was the director of facilities management. His supervisor was the vice chancellor for administration, defendant Neher. The complaint alleges that in early to mid March 2011, it became known that the position of director of facilities management was going to soon become available.

¶ 5 On or about March 17, 2011, the plaintiff forwarded correspondence to Neher requesting, per the affirmative action policy, that the department work in conjunction with the office of institutional compliance to ensure the newly opened position be made available for a minority. The plaintiff informed Neher of her responsibilities in performing the exact duties of the retiring director of facilities management for the four-year period of time in her current position when the director was not present. The plaintiff further referenced SIUE's affirmative action policy, calling for a "waiver" of the posting of an upcoming vacancy, and/or requirements within that job position, which she

alleged allowed the posting of the job to be bypassed when a minority candidate met the requisites of the job.

¶ 6 According to the complaint, on March 18, 2011, Neher informed the plaintiff that he had decided to follow "normal" procedures and institute a national search for a director of facilities management, and that the new director would be selected through that process. He also indicated that he had originally planned to offer the plaintiff the opportunity to be on the search committee for the position, although he believed it to be a conflict of interest because she had expressed interest in the job.

¶ 7 On or about August 23, 2011, the plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she was discriminated against by virtue of her race. According to her complaint, after receiving a right to sue letter on October 11, 2012, the plaintiff filed a lawsuit in federal court alleging violations of civil rights law. The complaint alleged that the federal suit was still pending.

¶ 8 Sometime in October 2011, the plaintiff was appointed to be on a search committee whose function was to put together a list of candidates for the position of manager of campus architects at SIUE. After the committee put together a list, the plaintiff orally informed the vice chancellor that he and SIUE were in violation of SIUE's affirmative action policy by not even considering the application of a qualified minority applicant for the position. On December 2, 2011, the plaintiff placed the above concerns in an email to the vice chancellor, in which she pointed out that the position was an "identified problem area" in the 2011-2012 SIUE affirmative action policy.

¶ 9 According to the complaint, within days of sending the email, the plaintiff began to experience the following retaliatory actions which continued to the time of filing the complaint. The plaintiff alleged that her job description was altered unilaterally on December 11, 2011, resulting in a demotion. In addition, the complaint alleged that the defendants created a work environment whereby her supervisory authority was undermined and that she had been singled out regarding budget, performance, and disciplinary matters. The complaint alleged that on October 2, 2013, the plaintiff was given a "pre-textual oral reprimand," the first step in SIUE's disciplinary process, for allegedly failing to obey a direct order to counsel one of her supervisors, when in fact the plaintiff had counseled that employee. The complaint alleged that this "retaliatory and pre-textual conduct" was for the purpose of setting up the conditions for a defensible termination of the plaintiff "and/or to create a hostile working environment" to induce the plaintiff to leave her job voluntarily. The complaint alleges that SIUE's motive to constructively terminate her was evidenced during a settlement conference in the federal court on or about November 1, 2013, wherein SIUE insisted that the plaintiff would have to resign from her job as a condition of any settlement of any of her claims.

¶ 10 Count I of the complaint alleges a cause of action pursuant to the Illinois Civil Rights Act of 2003 (ICRA) (740 ILCS 23/5 (West 2012)), on the basis that the defendants subjected the plaintiff to racial discrimination based on her status as an African American, in that the defendants denied the plaintiff the benefits to which she was entitled under SIUE affirmative action policies, wrongfully failed to promote her as director of facilities management, and gave false, pretextual reasons for their acts and

omissions. Count II of the complaint alleges a cause of action pursuant to the Illinois Whistleblower Act (IWA) (740 ILCS 174/1 *et seq.* (West 2012)), on the basis that SIUE's actions were in retaliation against the plaintiff for her disclosures to SIUE and Neher regarding SIUE's wrongful noncompliance with federal and state race discrimination laws on her own behalf and on behalf of a fellow employee who had applied for the position of manager of campus architects.

¶ 11 On March 3, 2014, the defendants filed a motion to dismiss pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619 (West 2012)). As to count I, the defendants argued that the plaintiff's cause of action pursuant to the ICRA was barred by the doctrine of *res judicata* because the plaintiff filed an identical claim against the defendants in the prior federal court action, which the federal court dismissed with prejudice. Alternatively, the defendants argued that count I was barred by the two-year statute of limitations set forth by ICRA. 740 ILCS 23/5(b) (West 2012). Finally, the defendants argued that count I should be dismissed because ICRA does not provide a cause of action for retaliation, and to the extent the plaintiff's claims should be construed as claims for discrimination, her allegations do not amount to an adverse employment action. As to count II, the defendants argued that a cause of action under the IWA also requires an adverse employment action, which the plaintiff failed to allege.

¶ 12 The record reveals the following facts surrounding the federal action. The plaintiff filed a second amended complaint against the defendants in the United States District Court for the Southern District of Illinois on April 6, 2013. A review of this

pleading reveals that all of the general allegations match those contained in the complaint in the instant action, with the exception of allegations stated in the complaint in the instant actions which occurred after October 2011. As outlined above, the additional allegations contained in the instant complaint concern the filing of the federal complaint, the plaintiff's assistance of another SIUE employee in making claims for violation of SIUE's affirmative action plan, alleged retaliatory actions on the part of the defendants between December 2011 and October 2013, and allegations concerning the settlement conference in November 2013. Counts I and II of the second amended federal complaint alleged causes of action against each defendant under federal civil rights law. 42 U.S.C. § 1981 (1991); 42 U.S.C. § 1983 (1996). Count III of the second amended federal complaint alleged a cause of action pursuant to ICRA. 740 ILCS 23/5 (West 2012).

¶ 13 On July 24, 2013, the federal court entered an order dismissing many of the plaintiff's claims and denying the plaintiff's motion for leave to file a third amended complaint. The federal court dismissed the plaintiff's ICRA claims, finding that the ICRA claims against Neher were deficient because ICRA only permits a suit against governmental entities. Additionally, the federal court found that the ICRA claim against SIUE was untimely because it was not included in the original complaint, was filed outside of a 90-day limitations period provided by the EEOC in its "right to sue" letter, and did not relate back to the filing of the complaint. According to the federal court's order, the only claims that survived dismissal were federal claims. On January 10, 2014, the parties to the federal action filed a stipulation for dismissal, with prejudice, of the

remaining claims, which the federal court granted on January 13, 2014. The plaintiff did not appeal the dismissal of her ICRA claims.

¶ 14 After considering the submissions of both parties and oral argument, on August 14, 2014, the circuit court entered an order granting the defendants' motion to dismiss, concluding that the plaintiff's claims arising from allegations pleaded in the federal action were barred by *res judicata*, and that all allegations taking place after the dismissal of the federal action did not constitute an actionable claim under either ICRA or IWA. The plaintiff filed a timely notice of appeal.

¶ 15 ANALYSIS

¶ 16 We begin our analysis by noting the applicable standard of review. We review *de novo* a circuit court's decision to grant a motion to dismiss. *Carroll v. Faust*, 311 Ill. App. 3d 679, 684 (2000). We may affirm the decision of the circuit court on any basis in the record. *Reyes v. Walker*, 358 Ill. App. 3d 1122, 1124 (2005). We first address the plaintiff's argument on appeal that her claims are not barred by the doctrine of *res judicata*. "*Res judicata* is an equitable doctrine designed to prevent the multiplicity of lawsuits between the same parties and involving the same facts and the same issues." *Murneigh v. Gainer*, 177 Ill. 2d 287, 299 (1997). "Under this doctrine, a final judgment on the merits of a cause operates as a bar to subsequent litigation of the same claim, demand, or cause of action between the same parties." *Id.* (citing *Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490 (1993)). A voluntary dismissal with prejudice should be treated as a final judgment on the merits for the purpose of *res judicata*. *Mann v. Rowland*, 342 Ill. App. 3d 827, 835 (2003). "*Res judicata* serves as a bar to litigation

of all issues that were actually decided and of all issues that could have been raised and determined in the earlier action." *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 617 (2007).

¶ 17 Here, the federal court entered an order dismissing the plaintiff's ICRA claims against the defendants with prejudice, and the plaintiff subsequently voluntarily dismissed the entire federal action with prejudice. The federal action involved the same parties and was based upon the same alleged facts. In fact, the first 26 paragraphs of the complaint in the instant action are substantively identical to the first 26 paragraphs of the complaint in the federal action. The federal court's dismissal of the plaintiff's ICRA claims with prejudice and the plaintiff's subsequent voluntary dismissal of the rest of her claims was a final judgment on the merits. See *Mann*, 342 Ill. App. 3d at 835. This federal judgment precludes the plaintiff from filing an ICRA claim in state court, and to the extent that her IWA claims arise from those same allegations taking place before the entry of the federal judgment, *res judicata* bars those claims in state court as well. See *Fuller Family Holdings*, 371 Ill. App. 3d at 617. Accordingly, the circuit court was correct in its finding that the doctrine of *res judicata* bars the plaintiff's attempts to relitigate these claims in the case at bar. The plaintiff's arguments aimed at circumventing this doctrine as applied to this case fail for the following reasons.

¶ 18 First, the plaintiff argues that *res judicata* should not bar her claims in the instant case because section 13-217 of the Code (735 ILCS 5/13-217 (West 2012)) permits her to refile her claims within one year. However, this section of the Code would only apply to allow for the refiling of the plaintiff's claims if the federal court dismissed the claims for

improper venue or for a lack of jurisdiction. *Id.* Here the federal court dismissed the plaintiff's ICRA claims because it found that the claims were untimely, not for a lack of jurisdiction or improper venue. Accordingly, section 13-217 of the Code (735 ILCS 5/13-217 (West 2012)) has no bearing on the issues in this case.

¶ 19 Second, the plaintiff argues that *res judicata* does not apply in this case because she has been subject to a continuing or recurring wrong when considering the events that she has alleged which occurred subsequent to the adjudication of her federal complaint. In support of her position, the plaintiff cites *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 341 (1996). In *Rein*, the Illinois Supreme Court, citing the Restatement (Second) of Judgments, outlined exceptions to the rule against claim-splitting, which prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action. *Id.* at 340. The rule against claim-splitting is inapplicable to the case at bar because the vast majority of the allegations upon which the plaintiff's claims are based were dismissed with prejudice in the prior federal action. As to the allegations of wrongdoing on the part of the defendants occurring after the federal case was dismissed, for the reasons that follow, we find no cause of action under ICRA or IWA.

¶ 20 ICRA provides, in relevant part, as follows:

> "No unit of State, county, or local government in Illinois shall:
>
> (1) exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of a person's race, color, national origin, or gender" 740 ILCS 23/5 (West 2012).

¶ 21 ICRA was enacted in order to create a state venue for adjudication of claims that a governmental entity's policy or practice has an adverse disparate impact on a protected class of individuals. *Jackson v. Cerpa*, 696 F. Supp. 2d 962, 964 (N.D. Ill. 2010). In order to advance a cause of action pursuant to ICRA with regard to a governmental entity's employment practices, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs and promotion because of their membership in a protected group. *Id.* at 963. The plaintiff attempted to state a cause of action under this statute by alleging that she was denied "the benefits of SIUE's Affirmative Action policies." However, as explained above, this allegation is clearly *res judicata.* Moreover, a claim of individual employment discrimination, such as that alleged in the plaintiff's complaint, appears to be one that is properly brought under section 2-102 of the Illinois Human Rights Act (775 ILCS 5/2-102 (West 2012)), which declares that it is a civil rights violation "[f]or any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status." It is unclear to this court why the plaintiff did not proceed under the procedures set forth therein, which constitute a jurisdictional prerequisite for relief. See 775 ILCS 5/7A-102 (West 2012).

¶ 22 Turning to the allegations in the complaint which postdate the dismissal of the federal action, the plaintiff alleges that on October 2, 2014, she was given a "pre-textual oral reprimand," which she alleges is "the first step in SIUE's disciplinary process,"

because she "fail[ed] to obey a direct order to counsel one of her supervisors, when in fact [the p]laintiff had counseled the employee." The plaintiff alleges the oral reprimand was given "for the purpose of setting up the conditions for a defensible termination by [the d]efendants of [the p]laintiff's employment." The plaintiff further alleges that on November 1, 2013, during a telephone conference with Federal Magistrate Stephen Williams, the defendants insisted that "before it [*sic*] would talk about an informal resolution of [the p]laintiff's claims[,] [the p]laintiff would have to agree to resign from her job as a condition of any settlement." These allegations do not amount to ICRA claims because there is no allegation that the plaintiff was deprived of the benefit of or participation in a government program. See *Illinois Native American Bar Ass'n v. University of Illinois*, 368 Ill. App. 3d 321, 327 (2006) (ICRA provides a venue for individuals to bring a cause of action alleging disparate impact of a government policy via the state courts which they did not have before). For these reasons, the plaintiff's postdismissal allegations regarding an oral reprimand and settlement negotiations in the federal action are not actionable under ICRA, and this court has no jurisdiction to consider them as allegations of a violation of the Illinois Human Rights Act. See 775 ILCS 5/7A-102 (West 2012).

¶ 23 We next examine the allegations in the plaintiff's complaint that postdate the dismissal of the federal action in the context of the IWA. 740 ILCS 174/1 *et seq.* (West 2012). Pursuant to IWA, an employer may not retaliate against an employee for disclosing information the employee reasonably believes discloses a violation of law by the employer in a court or other proceeding or to a government or law enforcement

agency. 740 ILCS 174/15 (West 2012). Retaliation, short of termination, under the IWA is defined as an "act or omission [that] would be materially adverse to a reasonable employee." 740 ILCS 174/20.1 (West 2012). A materially adverse employment action has been defined in the context of employment discrimination as " 'one that significantly alters the terms and conditions of the employee's job.' " *Owens v. Department of Human Rights*, 403 Ill. App. 3d 899, 919 (2010) (quoting *Griffin v. Potter*, 356 F.3d 824, 829 (7th Cir. 2004)). "Adverse employment actions include things such as hiring, denial of promotion, reassignment to a position with significantly different job responsibilities, or an action that causes a substantial change in benefits." *Id.* An oral reprimand simply does not rise to the level of an adverse employment action as a matter of law. With regard to the plaintiff's allegation that the defendants demanded that the plaintiff resign as a condition of any settlement, we note that settlement discussions are inadmissible as a matter of public policy, and cannot be considered as an adverse employment action. See *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088 (1995).

¶ 24 Finally, it is important to reiterate that we find the allegations of the plaintiff's complaint amount to allegations of human rights violations, and "[t]he Illinois Supreme Court has found that 'the legislature intended the [Illinois Human Rights Act], with its comprehensive scheme of remedies and administrative procedures, to be the exclusive source of redress for alleged human rights violations.' " *Alexander v. Northeastern Illinois University*, 586 F. Supp. 2d 905, 914 (N.D. Ill. 2008) (quoting *Mein v. Masonite Corp.*, 109 Ill. 2d 1, 7 (1985)). Where a claim is "inextricably linked" to a violation of an employee's civil rights, it is preempted by the Illinois Human Rights Act. *Id.* (citing

Geise v. Phoenix Co. of Chicago, Inc., 159 Ill. 2d 507, 516-17 (1994)). As such, when an IWA claim alleges retaliation against an employee for their complaints about discrimination, the Illinois Human Rights Act has been held to preempt the IWA claim and to divest the court of jurisdiction over the IWA claim. *Id*. at 914-15. We find this to be an independent basis on which to affirm the circuit court's order dismissing the plaintiff's IWA claim.

¶ 25 In sum, the plaintiff failed to appeal the federal court's dismissal of her claims and the doctrine of *res judicata* bars her attempt to file a duplicative action in state court. The substance of the plaintiff's allegations appear to fall within the purview of the Illinois Human Rights Act (775 ILCS 5/2-102 (West 2012)) rather than ICRA or IWA. It is unclear why the plaintiff did not avail herself of the comprehensive remedies set forth therein. At any rate, the only allegations set forth in the plaintiff's complaint that survive the federal court's dismissal of her claims do not state a cause of action under either ICRA or IWA, and the circuit court did not err in dismissing her complaint.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the circuit court's August 14, 2014, order, dismissing the plaintiff's complaint, is affirmed.

¶ 28 Affirmed.